(8)

No. 85-1722

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, *et al.*,
Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY AND PRISON FELLOWSHIP MINISTRIES IN SUPPORT OF RESPONDENTS

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
MICHAEL A. PAULSEN
HEIDI S. HAGERMAN
CENTER FOR LAW &
RELIGIOUS FREEDOM
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

QUESTIONS PRESENTED

1. Whether the writ of certiorari should be dismissed as improvidently granted, where the judgment to be reviewed modifies a legal standard formulated abstractly, and not applied by either lower court to the facts of this case.

2. Whether the "compelling state interest/least-restrictive means" test for evaluating Free Exercise Clause claims is sufficiently flexible to address questions of free exercise arising in prison contexts, where deference must be given to the considered judgment of prison officials in matters of prison administration.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED	7
II. THE LEGAL STANDARD ARTICULATED BY THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS AND IS THE APPROPRIATE VEHICLE FOR ANALYZING FREE EXERCISE CLAIMS BROUGHT BY INMATES	11
A. The Brief of the United States misapprehends the nature of Free Exercise Clause claims and therefore misrepresents this Court's Free Exercise Clause doctrine	12
B. The "compelling state interest/least-retrictive means" test is appropriate for analyzing inmates' free exercise claims	17
C. Under the "compelling state interest/least-restrictive means" test, respondents should have been granted relief on their free exercise claims	23
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

Allen v. Wright, 104 S.Ct. 3315 (1984) 7
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 4, 7
Bell v. Wolfish, 441 U.S. 520 (1979) ..... 5, *passim*
Bob Jones University v. United States, 461 U.S. 574 (1983) 17
Bowen v. Roy, slip op. No. 84-780 (June 11, 1986) .. 17, 21
Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339 (1892) 4, 7
Cruz v. Beto, 405 U.S. 319 (1972) 2, 19
Goldman v. Weinberger, slip op. No. 84-1097 (March 25, 1986) 11, 14, 17, 20, 22
Herb v. Pitcairn, 324 U.S. 117 (1945) 9
Hobbie v. Unemployment Appeals Commission, No. 85-993, *argued* (December 10, 1986) 22
Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979) 19
Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) ..... 5, *passim*
Lee v. Washington, 390 U.S. 333 (1968) (*per curiam*) 24
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 7
Pell v. Procunier, 417 U.S. 817 (1974) ..... 2, *passim*
Sherbert v. Verner, 374 U.S. 398 (1963) 12, 17, 22
St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980) .. 9
Thomas v. Review Board, 450 U.S. 707 (1981) 11, 12, 17, 21, 22
United States v. Lee, 455 U.S. 252 (1982) 11, 22
Wisconsin v. Yoder, 406 U.S. 205 (1972) 11, 12, 22
Wolff v. McDonnell, 418 U.S. 539 (1974) 5

OTHER AUTHORITIES:

B. McKelvey, *American Prisons: A History of Good Intentions* (1977) 18
D. Van Ness, *Crime and Its Victims* (1986) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2722

EDWARD O'LONE, *et al.*,
Petitioners,
v.
ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY AND PRISON FELLOWSHIP MINISTRIES IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The Christian Legal Society is a nonprofit professional association of 3,500 judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual citizen's respect for, and allegiance to, our constitutional government.

Prison Fellowship Ministries is a national nonprofit organization founded in 1976 by Charles W. Colson. Its

purpose is to assist local Christian churches in ministering to prisoners, ex-prisoners and their families, and to work for a just and effective criminal justice system. Prison Fellowship is active in 428 state and federal prisons, working (through its volunteers and 170 employees) with more than 75,000 prison inmates and families each year. This is the first time that Prison Fellowship has ever participated, as a party or as *amicus curiae*, in any litigation concerning prisoners' rights. It does so here because of the great importance of the case. Prison Fellowship is concerned with the preservation of the constitutional rights of *all* inmates, of whatever religious faith, to worship together and exercise their religion to the full extent compatible with prison security, safety and order.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the Brief for the Respondents.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case does not present the question of whether prison officials must in all circumstances conform prison policies to the religious claims of a small group of inmates. The question presented is much narrower: Given that the state must accommodate the First Amendment rights of inmates to the free exercise of religion to the extent not incompatible with their status as inmates (*see Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972)), may prison officials reject the free exercise claim of individual inmates on the grounds that the *general policies* of the prison (which, applied to particular inmates, prohibit their obligatory religious exercise) are reasonably related to legitimate penological goals? The question is a pure legal

one of the standard of review to be applied to decisions by prison officials not to accommodate sincerely-held [1] religious beliefs of inmates.

1. The question comes before this Court in an unusually abstract posture—on review of a revised legal standard announced, but not applied, by the Court of Appeals. This Court is asked to review an abstract legal formulation in order to determine its correctness, where that formulation has yet to be applied by any lower court to the facts of this case. Determination of this issue, while of unquestioned importance, necessarily involves a conjecture as to what exactly is being reviewed. It is not clear precisely how (or, as we discuss below, whether) the "new" standard differs from the "old" one. The opinion below did not reverse the judgment of the district court (which had held for petitioners and against the inmates) but merely vacated the judgment for reconsideration in light of the court's revised statement of the legal standard. It is not at all clear that the Third Circuit intended the new test to be anything more than a gloss on the old one.

Moreover, it is quite possible that the district court might reach the same result upon reconsideration as it did in the first instance. Indeed, in its earlier holding the district court specifically considered the less restrictive alternatives proposed by respondents and found them inconsistent with the fundamental penological objectives of the Leesburg facility, concluding that "no less restrictive alternative could be adopted without potentially compromising a legitimate institutional objective." Pet. App. 53A-54A. Under well-settled principles of judicial restraint closely related to Article III of the Constitution,

[1] The fear of spurious claims is so prominent in Petitioners' brief and the Brief of the United States that it bears immediate emphasis that the religious beliefs of respondents are *uncontestedly* sincerely-held and their weekly religious observance of Jumu'ah absolutely central to their faith.

decision of such an important question of constitutional law should be avoided where it arises in so abstract a posture and where a decision on the question is quite likely unnecessary to resolution of the case or controversy before the Court. *See generally Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring); *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892).

2. Should this Court reach the merits, the *en banc* opinion of the Third Circuit should be affirmed. Though not without difficulty (particularly, the lack of clarity inherent when a shift in a legal standard is announced but not applied), the Third Circuit's approach can be seen as fully consistent with this Court's Free Exercise Clause doctrine, and with its decisions recognizing the wide-ranging discretion that must be accorded prison officials in deciding how prisons are to be run.

a. The crucial flaw in petitioner's position—and especially in that of the United States as *amicus curiae*—is that it ignores the *nature* of respondents' claim (and most religious claims) under the Free Exercise Clause, as a claim for individual accommodation. Prison officials *of course* must be permitted to make rules of general applicability for the prison as a whole, subject only to the requirement that they be reasonably related to legitimate penological goals. But respondents' free exercise claim is not in the nature of an attack on the rules themselves, but of a challenge to the legitimacy of the officials' refusal to make an exception in their particular case, where failure to do so effectively prohibits a religious exercise central to their faith. In this context, the well-settled "compelling state interest/least-restrictive means" test, properly understood, is completely appropriate.[2] The test is sufficiently flexible to be applicable to

[2] The test can be skewed in such a way as to appear to grant an absolute veto to religious persons (including inmates) over state policies. Such an obvious straw man—employed both by Petitioners and by the United States—should not be the basis for discarding the test. We discuss the components of the test at some length below. *Infra*, pp. 17-23.

free exercise claims brought by inmates. The strength of the state's interest in not granting an accommodation and the assessment of the damage to that interest that would result from granting the inmates' claimed accommodation are questions on which the judgments of prison officials can be accorded the traditional deference which this Court's cases require, so long as those views are reasonable and supported by the record.

This Court's decisions in free speech cases involving prisoners support this position. Those cases consistently emphasize two key considerations—the extent of the interference with free speech interests, and the availability of alternative avenues for the desired speech. *Bell v. Wolfish*, 441 U.S. 520, 550 (1979); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129-133 (1977); *Pell v. Procunier*, 417 U.S. 827-828 (1974). The speech cases hold that where the restrictions on prisoners' exercise of First Amendment rights are relatively minor time, place and manner regulations that leave open alternative avenues for the same speech, prison officials will be given "wide-ranging deference" (*Jones*, 433 U.S. at 126) in deciding what constitutes a "reasonable" place or manner restriction within the prison environment. But the cases make clear that prison officials could not justify an outright prohibition of inmate speech on the same terms as they could justify reasonable time, place and manner regulations of such speech, tied to the unique nature of the prison environment. *Pell*, 417 U.S. at 822. Indeed, the implication is precisely to the contrary. *Id.* at 822; *see Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) ("In sum, there must be a mutual accommodation between institutional needs and the provisions of the Constitution that are of general application.")

b. Were these principles applied to the case at bar, respondents' very narrow claims for accommodation would have to be recognized. Where, as here, equally accommodating alternatives for the exercise of the inmates' religion do not exist,[3] the prison's policies amount to a prohibition on religious exercise, not mere regulations on the time, place or manner of such exercise for reasons of prison security or safety. The "wide-ranging deference" language of *Wolfish*, *Jones*, and *Pell* cannot apply with equal force in such a situation.

The state's "compelling" penological interests, sufficient to override free exercise rights when accomplished narrowly, are those of security and the maintenance of prison order and discipline. Accommodation of respondents' religious exercise in the manner proposed by respondents (allowing re-entry on Fridays, or being assigned to an inside detail on Fridays) has not, on this record, been shown likely to substantially interfere with the state's compelling interests. (Indeed, the history of past successful accommodation provides convincing evidence to the contrary.) Even deferring to the judgments of prison officials, it appears that accommodation would not actually interfere with security, but with administrative convenience or the goal of producing Monday-through-Friday work schedule habits for Muslim inmates. Unless the goal of avoiding affinity groups centered upon a shared day of religious observance is both a legitimate and necessary means of avoiding a security threat (also belied on this record by the experience of past practice), the burden on respondents' religious liberty cannot be justified.

---

[3] In this regard, we quite agree that there is a legitimate concern that inmates may raise spurious claims that a particular religious need can be accommodated only in one way. However, nothing in the "compelling state interest/least restrictive means" test forecloses a preliminary threshold inquiry into the sincerity of a religious claim. Importantly, in the case before the Court, the sincerity of respondents' religious beliefs is conceded.

The writ of certiorari should be dismissed as improvidently granted. Alternatively, the judgment of the court of appeals should be affirmed and the cause remanded to the district court for further proceedings.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

This Court has long held that it will not decide important questions of constitutional law where presented in abstract form or where such a decision is not strictly necessary to the resolution of a case or controversy. *E.g.*, *Allen v. Wright*, 104 S.Ct. 3315, 3324-5 (1984) (reaffirming "Article III notion that federal courts may exercise power only 'in the last resort, and as a necessity' ") (*quoting Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). This tenet of the Court's jurisprudence is founded on the same principles as the "case or controversy" limitation of Article III—avoidance of decisions in hypothetical, abstract, moot or unripe cases. It is grounded in the recognition that the function of the federal judiciary is not to decide questions of law, but to decide *cases*. Questions of law are decided as necessary incidents of this judicial function, which is "solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

The avoidance of unnecessary or premature decisions on constitutional questions is a principle that goes beyond the jurisdictional constraints of Article III to include a larger concern for protecting the integrity of the role of the judiciary in a system of limited constitutional government and carefully separated powers. *See generally Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

Amici urge this Court to apply these tenets of judicial restraint to the instant case, and to dismiss the writ of

certiorari as improvidently granted. Though the Court is not without jurisdiction in this case, the unusual posture of the case as it comes before this Court counsels against a decision on the merits of the constitutional question, for two reasons. First, review is premature. Second, review may not be necessary to decide the dispute between the parties in this case.

Review is premature primarily because the case comes before the Court in a highly abstract posture—a pure legal question divorced from any concrete application to the facts involved in this case. The judgment under review is one declaring a modification of an earlier legal standard to be applied in cases involving Free Exercise Clause claims brought by prison inmates. The *en banc* opinion of the Third Circuit did not reverse the judgment of the district court, but merely vacated it for reconsideration under the modified legal standard announced. It is not clear exactly how (or, as we shall discuss at length below, *whether*) the "new" standard differs from the "old" one. The question presented to this Court—whether the legal standard stated by the court below is correct—is probably more difficult and certainly much more abstract than it would be had the Third Circuit's test been applied to the specific factual context presented by this case. In the absence of a concrete application, it is difficult to judge whether the opinion of the Third Circuit is proper or improper. The test of whether one legal standard is meaningfully different from another one is whether it decides cases differently. The important point is that such tests are only meaningful—and can only be judged—in their application. Such a basis for evaluating the refinement proposed by the court below is simply not before this Court at this stage of the proceedings.

It may well be that the Third Circuit intended the "new" standard to be little more than a gloss on the "old" one. The differences between the old standard and the revised one strike us as largely semantic—differences in terminology, verbal formulation and precision of expression. The court of appeals retained the requirement of deference to the judgment of prison officials; it merely held that such deference was not absolute, and could be given due weight within the traditional Free Exercise Clause test. (Pet. App. 7A, 10a). The court simply modified the formulation contained in *St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir. 1980), to correct the misimpression that absolute deference to prison officials is required in free exercise cases whenever prison officials declare that a religious practice raises potential security concerns. (Pet. App. 7A).

While attention to such nuances is of great importance, and can have enormous substantive consequences, that is not itself the reason for appellate review. This Court does not sit to revise opinions, but to correct judgments. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). Equally important, the impact of such nuances cannot be determined—and ought not be decided—in the abstract. It is not at all clear that the court of appeals' standard would *require* the district court to reach a different outcome than it did. The court of appeals apparently did not think so, as it did not reverse the district court's judgment, but merely vacated it for reconsideration. And the district court's opinion gives strong indications that it believed, rightly or wrongly, that the same result would obtain in the event that a "least restrictive alternative" test were applied, since "no less restrictive alternative could be adopted without potentially compromising a legitimate institutional objective." Pet App. 53A-54A.[4]

---

[4] We would still disagree with the district court's conclusion, *see infra*, pp. 23-25, but we feel it would be better for the court of appeals first to determine whether the district court erroneously applied the legal standard, before review by this Court is appropriate. (This would also give the meaning-in-application of the Third Circuit's formulation some clarity.)

Two conclusions follow from the above, which should bear on this Court's decision to exercise jurisdiction. First, it is not clear what results obtain, in the instant case or any other, from application of the legal standard under review. The meaning of the opinion below can only be judged in the abstract, at this point in the proceedings. A purported conflict with this Court's decisions or among the circuits may be wholly illusory. Second, a decision on the question before the Court may be unnecessary to the judgment of the district court. Resolution of the abstract constitutional question of the appropriate "test" to be applied may be totally unnecessary in this case. And if resolution of the question proves necessary to the disposition of the case, it can be reviewed at a later, more appropriate time.

To these two points may be added a third—the importance of the question itself counsels against a premature, unnecessary or hypothetical decision of it. Judicial restraint is no mere principle of convenience or of housekeeping, but one of preserving the integrity of adjudication and avoiding unnecessary errors resulting from judicial overreaching. Questions of the free exercise of religion are of too great importance to be resolved as abstractions. We urge this Court to dismiss the writ until such time as review is more appropriately granted.[5]

---

[5] We agree with respondents that this case is not actually moot. Nonetheless, the fact that one of the respondents is deceased and another has been paroled makes it all the more clear that resolution by this Court of the constitutional questions presented will be of little practical import in affecting the legal relations *of these parties*. The issues involved are important, but this alone is not a reason for exercise of this Court's authority and may indeed be a reason *not* to exercise such authority, where the case comes to the Court in a context that now remains little more than hypothetical.

II. THE LEGAL STANDARD ARTICULATED BY THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS AND IS THE APPROPRIATE VEHICLE FOR ANALYZING FREE EXERCISE CLAIMS BROUGHT BY INMATES.

The principles that ordinarily govern Free Exercise Clause cases are well-settled: "[T]he state may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). This test has been formulated in slightly varying ways (see, *e.g.*, *United States v. Lee*, 455 U.S. 232, 252, 257-258 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 221 (1972)), but always with the two key elements of "compelling state interest" and "least restrictive means." *Goldman v. Weinberger*, No. 84-1097 (March 25, 1986), slip op. 3 (O'Connor, J., dissenting).

With few exceptions,[6] we believe this test is sufficiently flexible to embrace the broad array of situations in which free exercise claims arise, once the components of the test are clearly stated and understood. *See Goldman*, slip op. 3 (O'Connor, J., dissenting). The test may also be seen to be fully consistent with the need for deference to the judgment of prison officials in matters of prison administration and security. Should this court decide to reach the issue of the correctness of the court of appeals' holding that this test is applicable to free exercise claims by prisoners, it should affirm that holding.

---

[6] *Goldman v. Weinberger*, No. 84-1097 (March 25, 1986), while not explicitly decided under this approach, is consistent with it. *Goldman* may be read as holding that the military has a compelling interest in the discipline and esprit de corps of its personnel and that the Air Force had sustained its burden of proving that permitting deviations in uniform requirements by members of various religions would substantially undermine this compelling interest. *See also, infra* at 17, n.10.

A. The Brief of the United States misapprehends the nature of Free Exercise Clause claims and therefore misrepresents this Court's Free Exercise Clause doctrine.

Petitioners' and the United States'[7] objections to the use of the well-settled "compelling state interest/least-restrictive means" test for analyzing free exercise claims of inmates are predicated on a basic misunderstanding of what that test requires. Claims of individual right under the Free Exercise Clause do not seek to strike down government programs or policies as themselves unconstitutional, but rather seek to obtain a constitutionally-required *exemption* (or accommodation) from rules of general applicability, where refusal to grant such accommodation burdens the individual's *bona fide* religious belief, observance or practice. *See, e.g., Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

A failure to recognize that free exercise cases challenge not the government rule or policy itself, but the failure to grant an exception to such rule or policy, leads the United States to misrepresent present doctrine in three specific ways:

First, and of greatest importance, the United States focuses on the *general policy* as that which must be justified (by whatever standard is employed), arguing in this case that the "no return" policy "was reasonably related to legitimate penological objectives." Brief for United States at 28. But respondents do not challenge the prison policy as unconstitutional. They challenge only the refusal of prison officials to modify that policy *in the particular case*, or accommodate through alternative means

[7] To avoid repetition of material likely to be presented in respondents' brief, we will not address petitioners' brief at length but will focus on the analytic errors contained in the Brief for the United States as *amicus curiae*.

(Friday work detail reassignment) their need to attend a religiously-required sabbath observance of the Muslim faith. It is that refusal, not the policy itself, which respondents challenge, and which petitioners must justify under whatever legal standard is employed.

Second, by treating free exercise claims as if they sought to strike down whole government programs or invalidate prison policies across-the-board, the United States has transformed the "least-restrictive means" test into a straw man. The test is then ridiculed as "[u]niquely inflexible" in that it would "handcuff prison officials in their attempts to forestall threats to security in advance . . .". The test is represented as "impos[ing] on defendant officials the impossible task of setting up and then shooting down every conceivable alternative means of accommodation, never eliminating the possibility that a court somewhere would conclude that there is a better way to run the prison . . .". *Id.* at 20-21. The "least-restrictive means" inquiry requires nothing of the kind. Rather, this component of the test merely asks whether granting the claimed religious accommodation proposed by the adherent *for the particular case*, would substantially harm an unusually important government interest. This inquiry does not require the government to exhaust all possible alternatives to find the general rule that will accommodate all conceivable religions (for certainly no such rule exists) but looks to the marginal impairment to the state's interest that would result from granting an exemption to the religious claimant. (We discuss the "least restrictive means" component of the test at greater length below. *Infra*, pp. 20-23.)

Third, doctrine developed in free speech cases involving inmates, while instructive, cannot be transferred to free exercise cases so readily as the United States assumes. This is not because free exercise rights are *more important* than free speech rights, but because the nature of the asserted rights are *different*. Free speech

rights, held against government, are held in the exact same way by all citizens. If the government action is unconstitutional as respects one person, it will be unconstitutional as respects all. Free exercise rights, while possessed by all citizens against government, affect individuals differently depending upon the differing requirements of their respective religions. Government action may be unconstitutional as respects one person, because of the unique nature of that person's religious exercise, but still constitutional in the general class of cases, because others' religious exercise will not always (or even frequently) be burdened in similar fashion. Accordingly, the interference with prison policies (and state policies generally) occasioned by free exercise claims is *not* as great as that produced by free speech demands. The state must grant the free exercise claim only to the religious adherent, and to those others who assert a constitutionally indistinguishable[8] *bona fide* religious claim, not to everybody.

Moreover, the prisoners' speech cases relied on by the United States—*Bell v. Wolfish*, 441 U.S. 520 (1979), *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), and *Pell v. Procunier*, 417 U.S. 817 (1974)—do not support the proposition for which they are cited. None of these cases involved a complete prohibition on speech by prisoners; each case involved only the question of whether time, place and manner restrictions on inmate speech were reasonable, in light of the unique environment of a prison, and in light of the availability of alternative channels for the same basic communication. The consistent emphasis is on (1) the degree of impairment of First Amendment interests; and (2) the availability of fully efficacious, alternative avenues for the same communication. *Wolfish*, 441 U.S. at 550 ("publisher only" restriction on hardcover books reasonable manner restriction where impact on speech rights minimal and alternative avenues for materials available); *Jones*, 433 U.S. at 129-133 (1977) (impact on speech minimal; alternative avenues of communication available); *Pell*, 417 U.S. at 827-28 (1974) (availability of alternative means of communicating with media justified restriction on face-to-face visits, where prompted by legitimate security concerns).

[8] *Goldman*, slip op. at 1 (Blackmun, J., dissenting).

It is simply not accurate to characterize these cases as holding that a "reasonable relation" standard applies in cases where prison policies impinge upon inmates' First Amendment rights. Such a sweeping generalization considerably broadens—and, we think, seriously distorts—the rule of decision applied in each of those cases. A more accurate summary of the cases would be that where restrictions on First Amendment rights of inmates are merely time, place or manner restrictions that leave available ample alternative channels for functionally identical exercises of such rights, prison officials will be given "wide-ranging deference" to decide what constitute "reasonable" time, place or manner regulations in the unique context of a prison, out of a non-exaggerated concern for institutional security. This proposition is narrower and, we submit, a more precise statement of the law.[9]

[9] The United States dispenses with what are arguably the controlling considerations in those cases with a two-sentence footnote: "In *Pell*, the Court found it 'relevant' to the reasonableness of the restriction that prisoners had other means of communicating with members of the general public (417 U.S. at 823-824). In this case, by analogy, the Muslim inmates were permitted to practice their religion in other ways; the prison policy at issue here affected only their ability to attend Jumu'ah." Brief of United States, at 16, n.12.

This analysis is wholly inadequate. First, the availability of alternatives was not only "relevant" in *Pell*, but indeed appears to be a fact important to the outcome, and certainly a factor important to the legal analysis to be employed. Second, such a factor was important not only in *Pell*, but as noted above, in *Wolfish* and *Jones* as well, the other cases on which the United States relies. Third, the "analogy" between the extent of the infringement on First

The free speech cases are doubtless instructive here, but not in the way the United States suggests. *Wolfish*, *Jones* and *Pell* suggest that where there exist *various* less restrictive alternatives that accommodate the religious claim (here, the need of Muslim inmates to attend Jumu'ah), prison officials have wide-ranging authority to decide which one they prefer; inmates cannot dictate the precise terms and conditions on which their religious exercise is to be accommodated. For example, there were several alternatives available for accommodating respondents' need to attend Jumu'ah—re-entry into the prison building or assignment to an inside work detail on Friday, to name just the two most important. Prison officials might validly choose a Friday reassignment rather than re-entry from the yard (because of security concerns), even though respondents would prefer the re-entry option. The interesting aspect of this case, though, is that respondents were prepared to accept *any* accommodation, even though that might mean foregoing the benefits of a less severe classification and of more desirable work details. Prison officials refused to accommodate any of the proposed options. This blanket refusal (and consequent prohibition of respondents' sincere exercise of religion) cannot be judged on the same terms as a prison decision to choose one route of reasonable accommodation of First Amendment rights rather than another.

Amendment interests in *Pell* and in the instant case is strained, to say the least. In *Pell*, the prison did not cut off access to the media, only face-to-face interviews at the prison. Here, respondents were cut off entirely from participation in *the* core weekly religious observance of their faith, a fact which is undisputed. In the speech cases, alternative avenues were available to inmates for the same basic communciation. Here, respondents' required sabbath observance is one for which the record reveals no alternative that fulfills the religious obligation. Given the United States' interesting theological discussion on the importance of religion, contained in the subsequent pages of its brief (Br. 17-18), it is ironic that they treat respondents' religious observances with so little respect.

B. The "compelling state interest/least-restrictive means" test is appropriate for analyzing inmates' free exercise claims.

1. Properly understood, the "compelling state interest/least-restrictive means" test is fully harmonious with the need to accord wide-ranging deference to the informed judgment of prison officials on the impact that a change of policy—or the granting of a religious accommodation—would have on prison administration and security. The requirement of a "compelling state interest" has an obvious and ready application in the prison context. The state has a compelling interest in assuring prion security, discipline and order. Respondents appear to concede as much. It is therefore unnecessary in this case to discuss at length the exact meaning of "compelling state interest" or enumerate with precision all those state interests which might fairly be deemed compelling.[10]

---

[10] As a general matter, the state has a "compelling" interest—that is, an interest of unusual or especial importance (*Goldman*, slip op. 3, 4 (O'Connor, J., dissenting))—where the state possesses *an unusually strong claim of jurisdictional authority over the conduct in question*, for example, (1) by virtue of a specific, exclusive constitutional delegation of power; *see, e.g., Goldman, supra; cf. Bob Jones University v. United States*, 461 U.S. 574 (1983); (2) in situations where the religious conduct imposes an injury on third persons, *i.e.*, those outside the ambit of the religious community, *see generally Sherbert v. Verner*, 374 U.S. 398, 403 (1963); or (3) in situations of affirmative waiver or forfeiture of a competing claim to autonomy by the religious claimant. The Court's cases seem generally to fit within these fairly narrow categories.

Crucially, though, the government does not have a "compelling" interest simply because it characterizes its interest as such. Still less does the government, Midas-like, acquire a "compelling" interest in all that it touches with the broadest reach of its powers. *See Bowen v. Roy*, No. 84-780 (June 11, 1986), slip op. 9 (O'Connor, J., concurring and dissenting); *cf. Thomas*, 450 U.S. at 721 (Rehnquist, J., dissenting) (perceived conflict in religious freedom guarantees of free exercise and nonestablishment partially attributable to expansion of government power).

Two points deserve clarification, however. First, the state's compelling interest in prison security does not mean that all legitimate penological goals are equally compelling, such as the goal of rehabilitation. Penological theories as to how and why society is to incarcerate offenders have reflected the transitory social theories of different generations. "Penitentiaries" were originally proposed by the early Quakers as places in which wrongdoers might read the Bible and do penance; crime was viewed as a spiritual problem to be remedied by an intensively-spiritual, rehabilitative environment, isolated from the world. "Reformatories" later arose, primarily to deal with youthful offenders, on the social theory that the conduct of these individuals could be "reformed" through training and discipline, while they were still young. Later penal institutions bore names reflecting less religious social theories of rehabilitation—"correctional" institutions, with their "medical model" rehabilitation programs. Even this most recent consensus now appears to have dissolved, and the less euphemistic term "prison" is back in vogue, reflecting a penology primarily of punishment, deterrence and incapacitation. *See generally* D. Van Ness, *Crime and Its Victims* 72-97 (1986); B. McKelvey, *American Prisons: A History of Good Intentions* (1977).

Our point is a simple one: None of these social theories constitutes a compelling state interest sufficient to override the free exercise of religion. The view of the Quakers, were it favored by prison officials today, would afford no justification for compelling Muslim inmates to forego their faith and study the Bible. The rehabilitative theories of some present-day sociologists likewise cannot of their own force justify the state's forcing upon prisoners a world-view or lifestyle (including a particular work-schedule [11]) incompatible with their most deeply-

[11] In the instant case, it is asserted that permitting respondents to return to the facility for Jumu'ah services, or giving them an alternative work assignment on Friday, would interfere with the rehabilitative training of respondents to work a "regular" Monday through Friday work week. Pet. App. at 46A.

held religious beliefs. And it is well-settled that the free exercise of religion may not be prohibited by prison officials for the penological purposes of punishment, deterrence or retribution. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972). Rather, it is clear that prisoners retain those First Amendment rights *not incompatible* with their status as prisoners. *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see Wolfish*, 441 U.S. at 546 (speaking of "mutual accommodation" between institutional objectives and constitutional rights). Certainly, then, the free exercise of religion can be deemed incompatible with a prisoner's status only when it threatens the state's compelling interests in security and order, and not when it merely is thought to interfere with his own rehabilitation, an otherwise worthy and legitimate penological objective.

The second crucial point to be recognized is that the state's compelling interest in prison security and discipline does not mean that the state has an equally "compelling" interest in any particular policy asserted to promote those ends. The state may not manipulate levels of abstraction in order to raise various subsidiary interests to the level of the "compelling" state interests they are thought to serve. That would be to confuse *objectives* with *means*. For example, the state's compelling interest here is in security and order, not in the "no re-entry" policy itself. Similarly, the state does not have a compelling interest in preventing affinity groups but in preserving order, discipline and security. Limiting re-entry or the formation of religious affinities among prisoners are policies ostensibly enacted as *means* of furthering the compelling interest in security. The marginal impairment of security resulting from modification of these policies is a question of "least-restrictive means", discussed below, not of compelling state interest.

2. Petitioners and the United States suggest that use of the "least-restrictive means" inquiry is inherently incompatible with the prison context. They suggest that the test would require prison officials to examine every conceivable alternative policy for its potential impact on every imaginable religious practice before it could adopt ordinary rules and regulations for day-to-day prison operation. We agree that this would impose an oppressive burden on prison officials, but we do not agree that that is what "least-restrictive means" requires. *See supra*, p. 13.

The question of overly-restrictive means addresses the marginal impairment of the state's compelling interest(s) that would result from granting the claimed religious accommodation, and of granting reasonably foreseeable religious claims of like kind. The test does not require the state to prove that its policy is literally the *least* restrictive general rule that might be formulated,[12] but rather to demonstrate that granting the alternative, or exception, proposed by the claimant—(and similar religious accommodations to similarly situated claimants) —would do *substantial harm* to the compelling interests the policy is assertedly designed to serve. *Goldman*, slip op. at 3 (O'Connor, J., dissenting). The essential inquiry is whether the state can achieve its purposes without injuring the religious freedom of the individual before the court.[13]

[12] Justice Blackmun has observed that "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation and thereby enable himself to vote to strike legilsation down." *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 188-9 (1979) (Blackmun, J., concurring). But that is not what is involved here. As noted above, free exercise litigation does not usually involve facial attacks on statutes or regulations but rather involves requests that *exceptions* be made to accommodate a felt religious need. The enforceability of the statute or policy in the general class of cases is not challenged (as it is not challenged here).

This question of *degree of impairment* of a particular state interest is essentially one of *proof of facts*. This component of the test thus has a natural application to inmate claims, consistent with the requirement of deference to the expertise of prison officials. Though the state ordinarily bears the burden of proving that its compelling interests would be substantially harmed by granting a religious exemption to relieve a burden on religious liberty attributable to state action (*Thomas*, 450 U.S. at 717), the testimony of prison officials on such matters must be accorded substantial deference, because of the fact of incarceration and the unique nature of the prison environment. The burden then shifts to the inmate to prove that the refusal of prison officials to grant an accommodation is an "exaggerated response" to a perceived security need. *Pell*, 417 U.S. at 827; *see Jones*, 433 U.S. at 128. But we think this shift in the burden of proof better explained not by any presumed special competence on the part of prison officials in deciding questions of constitutional fact, but on the theory that the condition of incarceration, where liberty is necessarily restricted, works a forfeiture of the *presumption* that normally operates in favor of the individual citizen who has shown that government action has burdened his religious liberty.[14]

[13] The idea that government may satisfy this burden by showing a "programmatic" least-restrictive means is therefore nonsensical. *Cf. Bowen v. Roy*, slip op. at 7 (O'Connor, J., concurring and dissenting). Where no program is challenged, a "programmatic" justification is unresponsive. Where a refusal to accommodate a burdened religious belief is averred, it is the necessity of such a refusal to accommodate that must be defended.

[14] The scope of free exercise liberty depends on the context in which such claims arise, not on blind deference to "experts" in a particular field. We are concerned that were the principle of deference to the judgments of prison officials applied outside the walls

Such a reallocation of the burden of proof is not inconsequential. An assessment of the impairment that would result to the state's ability to achieve its goals must take into account a fair and realistic (and not merely imaginative) assessment of the likely impact of granting not only the particular accommodation claimed but also the impact of making similar exceptions in truly similar circumstances. *United States v. Lee*, 455 U.S. 252, 259-60 (1982); *Goldman*, slip op. at 1 (Blackmun, J., dissenting) ("I feel that the Air Force is justified in considering not only the costs of allowing Captain Goldman to cover his head indoors, but also the cumulative costs of accommodating constitutionally indistinguishable requests for religious exemptions."). Ordinarily, the state bears the burden of proof on this question. *Thomas*, 450 U.S. at 717-718.[15] Shifting the

---

of prisons, the supposed special expertise of one party to free exercise litigation—invariably the government—might be deemed a dispositive consideration by courts, in all contexts. If such were the case, no free exercise claim would win. Unemployment compensation "experts" running a state's program would be granted deference in matters thought "peculiarly within their own competence" and permitted to deny free exercise claims on the bare assertion that such claims threaten substantial interference with the program. *Compare Hobbie v. Unemployment Appeals Commission*, No. 85-993, *argued* (December 10, 1986); *Thomas*, 450 U.S. 707; *Sherbert v. Verner*, 374 U.S. 398 (1963). Education "experts" of the state would be deferred to on questions of what is necessary to accomplish the state's interest in an educated citizenry. *Compare Wisconsin v. Yoder*, 460 U.S. 205 (1972). Of course, expert testimony—from both sides—may be appropriate in such cases, *see, e.g., Yoder*, 406 U.S. at 222-224, and can aid the trier of fact. But there is an important difference between allowing expert testimony on a factual issue and permitting state officials in effect to be the triers of fact in their own cases, by virtue of presumed superior competence in deciding the propriety and necessity of conduct alleged to violate constitutional rights. It is to any suggestion of the latter that we strongly object.

[15] This is appropriate for two reasons. First, the religious claimant has, by hypothesis, already demonstrated that the state

burden to inmates will make it highly unlikely for inmate claims to prevail where there is a substantial incentive for analogous claims to be fabricated by other inmates—which appears to be the major concern of petitioners and the United States. Brief for United States at 22-23. Inmate plaintiffs would have to demonstrate that granting the claimed accommodation would *not* result in the need similarly to accommodate large numbers of other inmates or to sort-out the *bona fides* of an unmanageably large number of creative "religious" claims.

The "least-restrictive means" test, properly understood, is fully amenable to principled and practical application in the prison context. The test is neither so extreme in favoring inmates as the caricature sketched by the United States nor so crabbed as the essentially unprecedented "reasonable relation" test proposed in its stead. The court of appeals did not err in choosing the traditional standard.

C. Under the "compelling state interest/least-restrictive means" test, respondents should have been granted relief on their free exercise claims.

As argued above, the meaning of a legal standard cannot be judged in the abstract, but only in application. Should this Court choose not to dismiss the writ, but to reach the merits and affirm the court of appeals' legal standard, we suggest that the Court indicate how that standard is to be applied on the facts of this case, and remand to the district court with directions.

---

policy burdens his sincerely-held religious belief, and the state is seeking nonetheless to deny an accommodation or exemption. Second, the state actor is typically in the best position to possess (or gather) information on this question of likely adverse impact on state objectives, and on the likelihood and forseeability of similarly-situated religious claims arising.

The question in this case is whether the refusal to either permit respondents to re-enter the building to attend Friday Jumu'ah services or to permit respondents to remain in the building that one day a week (either in cells or assigned to an alternative work detail) is essential to the state's asserted interest in prison security. On this record, we believe that respondents sustained their burden of disproving the state's assertions.

The crucial, overriding element of proof is the past experience of permitting Muslim prisoners to re-enter the facility for Jumu'ah. No comparable requests were made by other prisoners, nor did a proliferation of analogous claims for religious accommodation ensue. Neither security nor discipline appears to have been materially affected. This evidence is uncontradicted, indeed, uncontested. These significant facts should not escape the Court's attention.

Moreover, respondents' proposed alternative demonstrably posed no legitimate threat to security. The sole threat proffered by petitioners is that thought posed by affinity groups centered on a shared religious observance. Even if a policy of preventing religious affinities among prisoners is legitimate (and we have serious doubts about this, based on *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*) (affirming invalidation of racial segregation in prisons)), the danger to security thought to result from such religious congregations is belied by past permission for respondents to attend Jumu'ah and continued permission for inmates *with higher security classifications* to meet together for Jumu'ah observance.

The real state interest implicated by petitioners' refusal to grant respondents' proposed accommodations is either cost or administrative convenience. Given the strong evidence in the record that a rash of similar accommodations would *not* result from granting respondents' claim, these administrative costs are truly minor

in this case. The district court erred in its application of the law to these facts. Respondents' requests for judicially-enforced accommodation under the Free Exercise Clause should be granted.

CONCLUSION

For the above reasons, *amici* respectfully urge that the writ of certiorari be dismissed as improvidently granted or, alternatively, that the judgment of the court of appeals be affirmed.

Respectfully submitted,

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
MICHAEL A. PAULSEN
HEIDI S. HAGERMAN
CENTER FOR LAW &
RELIGIOUS FREEDOM
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

January 30, 1987